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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-696

NORA LEWIS, et al.,

Petitioners

V.

PHILIP MORRIS, INC., et al.,

Respondents

RESPONDENT UNIONS' BRIEF IN OPPOSITION

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Petitioners present two questions for decision, both of which misstate the issues, and each of which will be discussed in the order presented by petitioners as follows.

First, petitioners devote the thrust of their argument and the bulk of their brief to the proposition that the appeal heard and decided by the Fourth Circuit

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Court was "interlocutary" under 28 U.S.C. Section 1292(a)(1). In fact, the appeal was from a final decision of the District Court granting the plaintiffs injunctive relief against the defendants.

Thus, the Fourth Circuit early in its opinion states (App. 63a):

> "Initially, we dispose of a procedural point raised by the appellees, who have moved for dismissal of this appeal on the ground that the order appealed from is not a final order granting relief, citing Liberty Mutual v. Wetzel, 424 U.S. 737 (1976)." (Underscoring supplied.)

The order appealed from (which the District Court thereafter attempted to rescind), consisted of Stage II proceedings guidelines submitted by plaintiffs to the District Court, and these guidelines were adopted by the District Court in toto. In the Fourth Circuit, petitioners argued that the guidelines did not constitute an injunction, but this argument properly was rejected by the Fourth Circuit, which stated (App. 63a - 65a):

> "While the guidelines consist in part of additional findings of fact and conclusions of law, they require the defendants, among other things, to supply a list of all members of the class eligible for back pay, to pay interim attorneys' fees,

to develop job descriptions, not to limit transfer of employees from the stemmery at season's end, to hire both permanent and seasonal employees at each employment office, to advise all employees of all vacancies, and to keep applications active and on file for a period of no less than one year.

"In determining whether an order is or is not an injunction, we look to the substance, rather than the form, of an order. Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942). We believe the guidelines, requiring the defendants to act in some instances and forbidding them to act in others, to be an injunction. We do not agree with the plaintiffs' position that the guidelines, although requiring present affirmative action or restraint, are yet unappealable. Nor does it gain support from Liberty Mutual, supra, for there the court merely had found a violation of the act and had not ordered the defendants to take, or, refrain from, any action or to pay attorneys' fees. See 424 U.S. at 742."

The Fourth Circuit thereafter properly recited the law that "(a)lthough the proceedings in the District Court are not stayed by an application for an interlocutary appeal under 28 U.S.C. Section 1292(b), this is an appeal from the granting of an injunction under Section 1292(a), and the district court lost its power to vacate the order when the notices of appeal were filed," citing Zimmer v. McKeithen, 467 F. 2d 1382 (CA 5, 1973); rev'd en banc, 485 F. 2d 1297 (CA 5, 1973); aff'd sub nom East Carroll Parrish School Board v. Marshall, 424 U.S. 636, 638, n. 4 (1976) (App. 65a-66a). The Fourth Circuit Court of Appeals thereafter correctly concluded that "the Supreme Court has at least tacitly acknowledged that a district court loses jurisdiction to amend or vacate its order after the notice of appeal has been filed, which we hold" (App. 67a). (Citing additional cases from the 2nd, 3rd, 7th, 9th and 10th Circuits.)

Petitioners argue (Pet., p. 15) that the holding of the Fourth Circuit wastes the "scarce resources" of the appellate court on "matters no longer in controversy." Yet, the Fourth Circuit had before it a complete record on the issue of liability with which the guidelines were inextricably intertwined. This is not a case where the Fourth Circuit is stripping the District Court of jurisdiction, as petitioners argue. Rather, it is a case where petitioners seek to divest the Fourth Circuit Court of Appeals of jurisdiction because petitioners

are dissatisfied with the appellate ruling on the liability issue. Petitioners, at the expense of judicial economy, would sacrifice not only the scarce resources of the appellate court, but those of the district court as well, so that petitioners can obtain a "second bite at the apple." This they cannot do, for on the liability issues decided by the district court and the Fourth Circuit Court of Appeals, petitioners have indeed had their day in court in the fullest sense of the phrase.

Second, concerning the next and last question presented by petitioners, the misstatement of the issue is apparent. Petitioners state that "both courts below found there was an unrebutted prima facie case of discrimination" (App. 2), and cite statistics from the record (App. 3). Petitioners refer, of course, to the Fourth Circuit's dismissal of the race claim. What really happened in both courts below is graphically illustrated by the following excerpt from the Fourth Circuit's opinion, which, after citing Teamsters v. United States, 431 U.S. 324, 339-40, n. 20 (1977), states (App. 77a):

> "Teamsters, n.20, is consistent with the ruling of the district court here that, despite the prima facie statistical case, purposeful discrimination was not shown. It is thus clear that, although the district court considered whether or not to base its finding on a prima

> facie statistical case, it decided not to, rather finding that the statistical case did not support the conclusion of purposeful discrimination."
>
> "While an examination of the statistical evidence before and after the judgment in Quarles (Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va., 1968)) may not seem to disclose any differences of significant advantage to the plaintiffs, this case has neither been tried nor appealed on that ground." (App. 83a).

The Fourth Circuit thereafter rejected the district court's novel theory of liability, which rejection has not been challenged by petitioners, stating that it did "not think the failure of the company to announce innocence is a violation of Title VII . . . . when the company treated all applicants, black and white, the same" (App. 78a). Recognizing that "(t)he plaintiffs' claim involves the allegation that the company, through discriminatory initial job assignment policies, segregates workers into black and white departments" (App. 58a), the Fourth Circuit further states that the district court's basis for a finding of liability, as "to the unions is even more tenuous than to the company because the unions had nothing to do with hiring" (App. 85a). Further, the district

court found, and the Fourth Circuit affirmed, that the unions were not guilty of unfair representation (App. 94a). Petitioners do not challenge this.

Why did the Fourth Circuit remand the sex discrimination issue to the district court, while it dismissed the race issue? Because, unlike the race issue, as the Fourth Circuit states (App. 87a):

> "Remarkably, the district court did not make any finding as to whether or not women employees were assigned to the stemmery because of their sex, although we should have thought this was the principal issue in the case."

An examination of the Fourth Circuit's opinion on the race issue reveals a substantial analysis of the evidence upon which the district court relied in deciding that issue. However, the Fourth Circuit distinguishes the sex discrimination issue as follows (App. 91a - 92a):

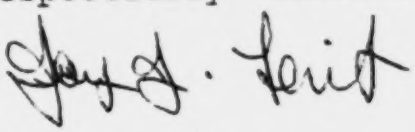
> "We have not attempted here any detailed analysis of the evidence with respect to sexual discrimination principally because the district court attempted none."
>
> "(T)he court made no analysis of the statistical information or the weight to be accorded

it under the facts advanced by the defendants."

We see that the statistical evidence was indeed considered, and rejected, by the district court on the race issue in line with the rationale of this Court's Teamsters decision.

The petition should be denied.

Respectfully submitted,



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CERTIFICATE

In accordance with Rule 24 of the Supreme Court of the United States, I hereby certify that I have this 24th day of November, 1978, filed the required copies of the Respondent Unions' Brief in Opposition in the Clerk's office, and have served the required copies of the said brief on Lewis T. Booker, Esq., Company counsel, 707 East Main Street, P. O. Box 1535, Richmond, Virginia 23212; and Henry L. Marsh,III, Esq., Plaintiffs' counsel, 214 East Clay Street, P. O. Box 27363, Richmond, Virginia 23261.

